United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2285

To be argued by
MICHAEL YOUNG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
TOBIA SPINA,

Relator-Appellant,

-against-

ADAM McQUILLAN, Warden,

Respondent-Appellee.

Docket No. 74-2285

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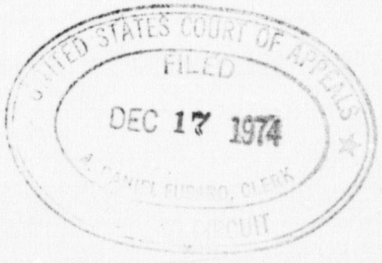
P/S

REPLY BRIEF FOR RELATOR-APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
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The State, in its answering brief in this appeal, disputes relator-appellant Spina's claim that the twenty-six month delay in his trial was caused by the State. Rather, it alleges that Spina either caused or consented to this delay (Appellee's Brief at 4-5, 10). In support of its version of the facts, however, the State relies solely on the unsworn hearsay statements of an Assistant District Attorney made during a pretrial colloquy with the trial judge, statements which were disputed then, as now, by Spina's counsel. Because the State court failed to hold a hear-

ing on Spina's motion for a speedy trial, and because the Federal District Court, again without a hearing, chose to credit the State's version of the facts, Spina has never been given an opportunity to cross-examine the Assistant District Attorney who made these claims, or to present evidence and witnesses to establish that the State was in fact responsible for virtually all of the delay in his trial. Since, at this stage in the proceedings, the State chooses to treat the Assistant District Attorney's allegations as dispositive of this factual dispute, Spina wishes to call to this Court's attention the fact that he is prepared to present evidence at a hearing to refute those allegations and to establish that his version of the facts is correct. Mr. Foner, Spina's trial attorney, is prepared to testify that his records show that virtually all of the adjournments in Spina's trial were made at the request of the prosecutor, frequently despite the declaration of the defense that it was ready to proceed to trial immediately. A copy of an affidavit made by Mr. Foner is attached hereto as Appendix A. Mr. Foner is also prepared to testify that because of the delay, he was unable to locate and/or subpoena four defense witnesses whose whereabouts had been known to him earlier in the proceedings (see Appendix A at 5). It was clearly improper for the District Judge to resolve the disputes as to responsibility for the delay and prejudice arising from the delay without first affording Spina an opportunity to present this and other evidence in support of his claims.

Moreover, although the State is quick to claim conclusive knowledge of what happened at the numerous adjournment proceedings in this case, it has failed ever to produce the transcripts of those proceedings, despite the fact that those transcripts would, in all likelihood, resolve most of the disputed facts in this case.* The burden of producing a complete record of trial and pretrial proceedings in habeas corpus proceedings clearly rests with the State. Hart v. Eyman, 458 F.2d 334 (9th Cir. 1972); Stokes v. Peyton, 437 F.2d 131 (4th Cir. 1971); United States v. Workcuff, 422 F.2d 700 (D.C. Cir. 1970); United States v. Sigal, 341 F.2d 837 (3d Cir. 1965); Washington v. Clemmer, 339 F.2d 715 (D.C. Cir. 1964); Brown v. United States, 314 F.2d 293 (9th Cir. 1963); Parrott v. United States, 314 F.2d 46 (10th Cir. 1963); Fowler v. United States, 310 F.2d 66 (5th Cir. 1962); Stephens v. United States, 289 F.2d 309 (5th Cir. 1961); United States ex rel. Miscavage v. District Court, 339 F.Supp. 292 (D. N.J. 1972); see also Chessman v. Leets, 354 U.S. 156 (1957); Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958). The State's failure to produce these transcripts should create an inference in support of Spina's version of what happened at those proceedings.

In its brief the State also points to the fact that Spina joined in his co-defendant's request for a stay in the proceed-

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*Spina and the Federal Public Defender Unit of The Legal Aid Society have been unsuccessful, to date, in their own repeated efforts to obtain those transcripts.

ings in December 1973 pending an application to the Appellate Division for a change of venue as proof that Spina caused the delay in his trial. The State neglects to say, however, that this motion caused only a brief delay in the trial, which commenced the following month, and that it was preceded by twenty-five months of State-occasioned delay in the proceedings. Moreover, the very basis for the application for a change in venue was the fact that the State had delayed the commencement of the trial until the midst of the public hearings of the Knapp Commission, the publicity surrounding which threatened to prejudice Spina's trial.

Furthermore, the State asserts as fact that Spina never requested that his case be brought to trial until the morning the trial actually began (Appellee's Brief at 8). Since Spina claimed in his petition that he had indeed requested that his case be brought to trial on earlier occasions, this, like the other factual disputes, is an appropriate matter for resolution by the District Court following a hearing.

Finally, the Court should note that appellee erroneously stated, in its brief at 8, that Spina was indicted in November 1971 and brought to trial in January 1973. In fact, Spina was indicted on November 28, 1969, and his trial commenced on January 6, 1972, some twenty-six months later.

CONCLUSION

For the above-stated reasons and the reasons set forth in relator-appellant's main brief, the order of the District Court denying the petition for a writ of habeas courpus should be reversed and the case remanded for a hearing.

Respectfully submitted,

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AFFIDAVIT

Docket No. 74-2285

STATE OF NEW YORK)
COUNTY OF KINGS) ss.:

HAROLD B. FONER, Esq., being duly sworn, deposes and says:

I am an attorney admitted to practice in the State of New York. My office is located at 188 Montague Street, Brooklyn, New York. I make this affidavit in support of Tobia Spina's motion for a remand to the United States District Court for the Southern District of New York in the above-captioned case.

I represented Mr. Spina in the state court proceedings which form the basis for his present Federal habeas corpus application.

At the request of Michael Young, Esq., Mr. Spina's present counsel, I have examined my papers to determine the dates and the reasons for the adjournments in Mr. Spina's trial. My papers indicate the following chronology of events in Mr. Spina's case:

On November 28, 1969, Mr. Spina pleaded not guilty to the charges.

On January 23, 1970, in Part 38 of the New York Supreme Court, the case was adjourned, at the request of Assistant District Attorney Weinstein, until March 27, 1970.

On March 27, 1970, the case was again adjourned, at the request of Assistant District Attorney Weinstein, to March 30, 1970.

On March 30, 1970, the case was again adjourned, at the request of Assistant District Attorney Weinstein, to April 20, 1970.

On October 23, 1970, in Part 33, the case was again adjourned, at the request of Assistant District Attorney Weinstein, to October 26, 1970.

On October 26, 1970, in Part 33, the case was again adjourned, at the request of Assistant District Attorney Weinstein, to January 12, 1971.

On January 12, 1971, in Part 37, the case was again adjourned, at the request of Assistant District Attorney Weinstein, to March 15, 1971.

On March 15, 1971, in Part 37, although the defense expressly informed the court that it was ready for trial, Assistant District Attorney Weinstein declared that the People were not ready, and the case was adjourned to March 31, 1971.

On the afternoon of March 15, 1971, Assistant District Attorney Weinstein called Mr. Spina and me into his office and

offered to allow Mr. Spina to plead guilty to a misdemeanor with a suspended sentence in satisfaction of the charges against him. Mr. Spina and I rejected this offer and asked that the case be brought to trial immediately.

On March 31, 1971, the case was again adjourned at the request of the Assistant District Attorney to April 29, 1971.

On April 29, 1971, in Part 38, the case was again adjourned at the request of the Assistant District Attorney to May 27, 1971.

On May 27, 1971, in Part 40, Assistant District Attorney Kiernan informed the court that the case would have to be adjourned because Assistant District Attorney Phillips would not be available to prosecute it until June 14, 1971. The case was then adjourned to that date.

On June 14, 1971, in Part 40, the Assistant District Attorney informed the court that Assistant District Attorney Phillips was still not available to prosecute the case. The case was therefore adjourned to September 24, 1971.

On September 24, 1971, in Part 37, the case was adjourned at the request of Assistant District Attorney Corriero to November 15, 1971.

On November 15, 1971, in Part 42, before Judge Miles Lane, both the People and the defense announced they were ready. Judge Lane marked the case ready and passed. The defense filed a motion with the court asking for a change of venue because of prejudicial pre-trial publicity.

On November 16, 1971, in Part 45, before Judge Lane, the case was marked ready and passed pending decision on the motion for a change of venue.

On November 17, 1971, in Part 42, before Judge Harold Burns, the prosecutor announced that he was not ready. The case was adjourned to November 23, 1971.

On November 23, 1971, in Part 42, before Judge Burns, the defendants again announced they were ready for trial, but the prosecutor stated he was not ready. The case was therefore adjourned until December 3, 1971.

On December 3, 1971, in Part 42, before Judge Gomez, the defendants were again marked ready, but the People again announced they were not ready. The case was therefore adjourned to December 6, 1971.

On December 6, 1971, the People again announced they were not ready, and the case was adjourned until December 13, 1971.

On December 13, 1971, in Part 42, the defense was still ready, but the People were not, and the case was adjourned to January 3, 1972.

On January 3, 1972, in Part 42, the People were still not ready, and the case was therefore adjourned to January 5, 1972.

On January 5, 1972, in Part 42, before Judge Lane, the case was marked ready and passed to January 6, 1972.

On January 6, 1972, the case was again marked ready and passed to January 7, 1972.

On January 7, 1972, seven jurors were selected.

On January 10, 1972, the rest of the jury was selected, and the case proceeded to trial.

Because of the delay in Mr. Spina's trial, I was unable to locate and/or subpoena four witnesses whose whereabouts had been known to me earlier in the proceedings.

Harold B. Foner

HAROLD FONER
B.

Sworn to before me this
17 day of December 1974

Notary Public

COURTENAY L. WILTSHIRE
NOTARY PUBLIC, STATE OF NEW YORK
Qualified in Kings County, No. 21-[illegible]
Cert. filed with Kings Co. Reg. 6
Term expires March 30, 197

Certificate of Service

December 17, 1974

I certify that a copy of this reply brief for relator-appellant has been mailed to the office of the Attorney General of the State of New York.